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Supreme Court, U.S.
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No. ____

IN THE
Supreme Court of the United States

POWEREX CORP., A CANADIAN CORPORATION,
DBA POWEREX ENERGY CORP.,
Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA
EX REL. BILL LOCKYER,
ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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November 4, 2005

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QUESTIONS PRESENTED

1. Whether an entity that is wholly and beneficially owned by a foreign state's instrumentality, that engages in energy trade on behalf of the foreign state, and that performs international treaty and trade agreement obligations for the benefit of the foreign state, may nonetheless be denied status as an "organ of a foreign state" under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1603(b)(2), based on an analysis of sovereignty that ignores the circumstances surrounding the entity's creation, conduct, and operations on behalf of its government.

2. Whether an entity is an "agency or instrumentality of a foreign state" under the FSIA, 28 U.S.C. § 1603(b)(2), when its shares are completely owned by a governmental corporation that, by statute, performs all of its acts as the agent of the foreign sovereign.

PARTIES TO THE PROCEEDINGS

Petitioner Powerex Corp., a Canadian corporation, dba Powerex Energy Corp. was the defendant/appellant in the district court and court of appeals proceedings.

Respondent People of the State of California ex rel. Bill Lockyer, Attorney General of the State of California, was the plaintiff/appellee in the district court and court of appeals proceedings.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Powerex Corp. states the following:

Powerex Corp. is a Canadian corporation incorporated under British Columbia's Company Act. Powerex is wholly owned by the British Columbia Hydro and Power Authority, which is a Provincial Crown Corporation owned in its entirety by Her Majesty the Queen in right of the Province of British Columbia. No publicly held company owns any Powerex stock.

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Special Directive No. 4 to the British Columbia Hydro and Power Authority, 0.1.c. 494/2000, §§ 5-8 8

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Canadian Embassy:

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State Trade Fact Sheets 2003, *available at* http://www.dfait-maeci.gc.ca.....26

State Trade Fact Sheets 2004, *available at* http://www.canadianembassy.org.....26

Joseph W. Dellapenna, *Refining the Foreign Sovereign Immunities Act*, 9 Willamette J. Int'l L. & Disp. Resol. 57 (2001).....15, 19

Joseph W. Hardy, Jr., Note, *Wipe Away the Tiers: Determining Agency or Instrumentality Status Under the Foreign Sovereign Immunities Act*, 31 Ga. L. Rev. 1121 (1997).....15

Hydro-Quebec:

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Annual Report 2002 (Mar. 31, 2003).....25

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Manitoba Hydro-Electric Board:

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51st Annual Report (July 29, 2002).....25

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2001/02 Annual Report (June 28, 2002).....25

2002/03 Annual Report (June 30, 2003).....25

2003/04 Annual Report ('une 30, 2004).....25

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Powerex Corp. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

INTRODUCTION

This case raises issues significant to the well-established practice of "governments throughout the world" using "separately constituted legal entities" to perform inherently sovereign functions. *See First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 624 (1983). It presents the same questions and involves the same petitioner as another petition for a writ of certiorari pending before this Court, *Powerex Corp. v. Reliant Energy Servs., Inc.*, No. 05-85 (docketed July 18, 2005).[1] This Court has directed the respondents in No. 05-85 to respond to that petition; that response is due on December 6, 2005. The pendency of these two petitions underscores the urgent need for this Court's review.

In No. 05-85, petitioner Powerex Corp. ("Powerex") seeks this Court's review of the Ninth Circuit's decision in *California v. NRG Energy Inc.*, 391 F.3d 1011 (2004) (Pet. App. 33a-49a). There, the Ninth Circuit erred in construing two aspects of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602 *et seq.* (the "FSIA"): first, in conflict with the Second, Third, and Fifth Circuits, the court defined an "organ of a foreign state or political subdivision" under § 1603(b)(2) in a mechanistic way that excludes pertinent evidence of the foreign sovereign's purpose in establishing the entity to perform international treaty and cross-border trade functions. Second, the Ninth Circuit created a test for a foreign state's ownership of a government corporation that ignores an agency relationship expressly created by statute, misapprehending this Court's decision in *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003). In No. 05-85, Canada and British

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[1] The arguments in this petition largely track those in No. 05-85, so that, if that case becomes mooted by subsequent events, the Court will have the benefit of the full presentation of issues in this case.

Columbia have taken the extraordinary step of filing *amicus curiae* briefs urging this Court to grant certiorari to reverse the Ninth Circuit.

Here, the Ninth Circuit dismissed Powerex's appeal, on the evident authority of *NRG Energy*. The court did not hold the case to await a decision by this Court on Powerex's pending certiorari petition, nor did it reconsider its *NRG Energy* holdings in light of the *amicus* briefs filed by the foreign sovereigns attesting to Powerex's sovereign status – filings the *NRG Energy* court did not have before it but that were before the Ninth Circuit in this case. The Ninth Circuit's judgment below exacerbates the conflicts created by *NRG Energy* with decisions of the Second, Third, and Fifth Circuits, as well as of this Court, on questions of exceptional importance to the United States' relationship with its largest trading partner.

Powerex was concededly created by the Province of British Columbia to sell electricity in the United States for the sole benefit of the Province from hydropower resources wholly owned and operated by the Province, and was likewise tasked by the Province to fulfill treaty obligations that the Province (and Canada) agreed to perform with the United States. The Ninth Circuit nonetheless has twice denied Powerex its rights under the FSIA to remove suits from state court and to enjoy the procedural safeguards (including the protection of a bench trial) that Congress has afforded to foreign sovereigns under the FSIA even when they are not eligible for substantive immunity.

The court's decision to follow *NRG Energy* in this case and to dismiss Powerex's appeal makes clear that Powerex will never get another opportunity to assert its FSIA rights in the U.S. judicial circuit in which it does the bulk of its business. Without this Court's review, every time that Powerex – or any other similarly situated entity – is sued within the Ninth Circuit's territorial jurisdiction, it will potentially face a lengthy jury trial in state court – a result the FSIA was intended to preclude. Because this case has profound effects on U.S.-Canada bilateral rela-

tions, the proper interpretation of the FSIA, and the commercial dealings of numerous foreign sovereign entities within the United States, this petition should be granted.

OPINIONS BELOW

The court of appeals' order dismissing Powerex's appeal (Pet. App. 1a) is unreported. The district court's opinion granting respondent's motion to remand (*id.* at 4a-15a) is unreported (but available at 2005 WL 2030718).

JURISDICTION

The court of appeals entered its judgment on October 6, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

TREATY & STATUTORY PROVISIONS INVOLVED

Relevant treaty and statutory provisions are set forth at Pet. App. 50a-202a.

STATEMENT OF THE CASE

1. The FSIA grants foreign states substantive immunity from the jurisdiction of federal and state courts, *see* 28 U.S.C. § 1604, subject to certain enumerated exceptions, *see id.* § 1605. Even when one of those exceptions applies and a foreign state is unable to claim substantive immunity from suit, the FSIA and related statutory provisions afford various jurisdictional and procedural protections to that foreign state, *see id.* §§ 1391(f), 1441(d), 1608-1611. One of those procedural advantages is the right of removal to federal court. Under § 1441(d), "[a]ny civil action brought in a State court against a foreign state as defined in [the FSIA] may be removed by the foreign state to [federal] district court," where the case is tried without a jury. The right of removal under the FSIA is a critical congressional guarantee, "[i]n view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area." H.R. Rep. No. 94-1487, at 32 (1976), 1976 U.S.C.C.A.N. 6604, 6631. The FSIA evinces Congress's intent "to channel cases against foreign sovereigns away from the state

courts and into federal courts." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 497 (1983).

The FSIA defines a "foreign state" as any "agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a). Section 1603(b) in turn defines an "agency or instrumentality of a foreign state" as any entity that (1) "is a separate legal person, corporate or otherwise"; (2) "is an organ of a foreign state" or "a majority of whose shares or other ownership interest is owned by a foreign state"; and (3) "is neither a citizen of a State of the United States" nor "created under the laws of any third country."

2. This action was originally filed in California state court by the California Attorney General ("California") against Powerex. California alleges that, from 1999 through 2001, Powerex engaged in fraudulent trading practices in the California wholesale energy market, in violation of California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 *et seq.*, and the California Commodity Law of 1990, Cal. Corp. Code §§ 29500 *et seq.* Powerex removed this case to federal district court by invoking the court's jurisdiction of cases against foreign states under § 1441(d) and § 1603(a) of the FSIA. Powerex acknowledged that it is not entitled to substantive immunity from suit (because its electricity sales in the United States constitute a "commercial activity" within the exceptions to sovereign immunity under the FSIA, *see* 28 U.S.C. § 1605(a)(2)). Even so, Powerex maintained that, as a foreign state, it was entitled to certain jurisdictional and procedural protections, in particular, the right to a federal forum, *see id.* § 1441(d). California moved to remand, which Powerex opposed.

3. Powerex supported its arguments below by referencing the undisputed evidence presented to the district court in *NRG Energy* and filed that evidence with the district court in this case.[2] That evidence showed that:

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[2] *See* Pet. App. 16a-18a. Subsequent Provincial statutory enactments have not altered those facts in any material respect.

In 1961, Canada and the United States signed the Columbia River Treaty (the "Treaty"),[3] under which Canada agreed to construct reservoir facilities in Canada to control the flow of the Columbia River in a way that would enable the United States to generate more power at its existing facilities on the Columbia River ("Downstream Benefits") and to provide enhanced flood control benefits to the U.S. Treaty art. II (Pet. App. 52a-53a). In return, Canada received a right to half of the Downstream Benefits over the 60-year life of the Treaty (the "Canadian Entitlement"). *Id.* art. V, § 1 (Pet. App. 55a). Canada and the United States were required to appoint "entities" to administer the Treaty. *Id.* art. XIV, § 1 (Pet. App. 63a).

In 1962, the British Columbia Provincial Government passed the British Columbia Hydro and Power Authority Act to establish an entity in which to hold assets it acquired and to promote major hydroelectric development, which included construction of significant storage dams and hydroelectric generating capacity on the Peace and Columbia River Systems (the "Two River Policy"). In 1964, the Provincial Government enacted another British Columbia Hydro and Power Authority Act ("Hydro Act"), which created the Provincial Crown Corporation known today as the British Columbia Hydro and Power Authority ("BC Hydro"). *See NRG Energy*, Pet. App. 39a. The Act enumerated all of BC Hydro's powers (including powers not generally available to private companies in British Columbia). The Act specifically provides that BC Hydro "is for all its purposes an agent of the government and its powers may be exercised only as an agent of the government." Hydro Act § 3(1) (Pet. App. 154a).

As a Provincial Crown Corporation, BC Hydro is owned in its entirety by Her Majesty the Queen in right of the Province of British Columbia ("Province"). Dividends

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[3] Treaty Between the United States of America and Canada Relating to Cooperative Development of the Water Resources of the Columbia River Basin, Jan. 17, 1961, 15 U.S.T. 1555 (Pet. App. 50a-125a).

from BC Hydro's operations are payable only pursuant to Provincial directives. All substantive powers of BC Hydro are subject to, and can only be exercised with, the approval of the Lieutenant Governor in Council or the Minister responsible for BC Hydro. Since its inception, BC Hydro has implemented the Two River Policy by building dams, developing storage capacity, and operating hydroelectric generating facilities. *See* Pet. App. 20a.

In 1964, Canada designated BC Hydro as the Canadian entity responsible for administering the Treaty. The U.S. designated Bonneville Power Administration ("BPA") and the Army Corps of Engineers collectively as the United States entity. That same year, Canada, the Province, and the U.S. agreed to a Protocol for the implementation of the Treaty that provided, in a separate document, that the Province would receive an upfront payment in place of return of the first 30 years of the Canadian Entitlement.

By 1984, BC Hydro completed construction of the Revelstoke Dam on the Columbia River, the last major facility contemplated under the Two River Policy. Because the Province's storage capacity exceeded the Province's electricity needs, BC Hydro became an active seller of power in foreign commerce at the international border to U.S. entities, principally BPA. Such sales, as well as the trading of the Canadian Entitlement to BPA-generated power in exchange for an upfront cash payment, accorded with the British Columbia Government's aim under the Treaty of maximizing the hydroelectric production capacity of the Columbia and Peace Rivers. In the late 1980s, the Provincial Government overhauled the legislation governing the Province's energy sector. The aim of that legislation was to create a governmental structure for the sale of surplus power in the export market. *See id.* at 205a. In December 1988, BC Hydro – acting as agent of the Provincial Government under the Hydro Act – incorporated the British Columbia Power Exportation Corporation under the Company Act of British Columbia as a wholly owned subsidiary of BC Hydro to serve the vital role of

marketing the Province's surplus electric power. *See id.* at 23a. The company changed its name in 1991 to the British Columbia Power Exchange Corporation, and in 2000 to Powerex Corp. *See id.*

From its inception, Powerex performed functions prescribed by Provincial officials. It initially took delivery of the Province's electricity available for export at the British Columbia border and sold it at the border to U.S. and Alberta purchasers. In 1997, Powerex received authorization from the Federal Energy Regulatory Commission ("FERC") to make sales of electricity at wholesale in interstate commerce at market-based rates. Powerex then entered into transmission arrangements with U.S. utilities and participated directly in U.S. wholesale bulk power markets, including California.

In the early 1990s, the Province directed Powerex to explore means of creating a more efficient Provincial power market for the trading of electricity among utilities, independent power producers, industrial consumers, and other major electricity consumers. Powerex also participated with BC Hydro in direct negotiations with the Corps of Engineers and BPA to define the Canadian Entitlement because, early in those talks, the potential for resale of the Canadian Entitlement in the U.S. became a key aspect of the negotiations. Ultimately, in 1999, the Province assigned its rights, title, and interest in the Canadian Entitlement to Powerex, which directly transmits to the Province an index-based price for Canadian Entitlement energy. Any "profits" that Powerex earns from selling the Entitlement energy is consolidated with BC Hydro's net income, which, in turn, is available for distribution through the Province's general revenues and/or to a "Rate Stabilization Account" for maintaining lower electricity rated for the Province's citizens.

In 1997, the Province enacted the Power for Jobs Development Act ("Jobs Act"), which directed that portions of BC Hydro's surplus electricity, including a Provincial Government-determined portion of the Canadian Enti-

tlement otherwise available for sale by Powerex externally, would be diverted to British Columbia industry to create jobs. *See* Jobs Act § 2 (Pet. App. 181a). The Jobs Act directed BC Hydro and Powerex to supply power to British Columbia businesses on terms defined by the Provincial Government. *See id.* § 3 (Pet. App. 181a).

In addition, the Province directed Powerex to perform treaty obligations incurred by the Province under the U.S.-Canadian Skagit River Treaty.[4] In the late 1990s, Powerex took the lead in negotiating transmission arrangements, pursuant to which BPA agreed to deliver to Seattle the power that Powerex obtained from BC Hydro. *See* Pet. App. 26a-27a. Powerex's treaty responsibilities increased through a later assignment of certain BC Hydro rights and obligations under the Treaty to Powerex.

The uncontradicted evidence further showed that, pursuant to Provincial legislation and regulations, all of Powerex's earnings are consolidated with those of BC Hydro for purposes of establishing BC Hydro's electricity rates.[5] Under a formula set by Provincial laws and regulations, BC Hydro annually pays to the Province accumulated net income from the combined operations of BC Hydro and Powerex.[6] Because it is entirely owned by BC Hydro, which is the statutory agent of the Province, Powerex is also subject to the Financial Administration Act, pursuant

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[4] Treaty Between Canada and the United States of America Relating to the Skagit River and Ross Lake, and the Seven Mile Reservoir on the Pend D'Oreille River, Apr. 2, 1984, T.I.A.S. No. 11088, 1469 U.N.T.S. 309 (Pet. App. 126a-134a). Under that agreement, the City of Seattle agreed not to raise the High Ross Dam, which would have had the effect of flooding substantial areas of British Columbia. In exchange, British Columbia agreed to deliver substantial quantities of electricity to Seattle through 2066.

[5] Special Direction No. 8 to the British Columbia Utilities Commission, B.C. Reg. 71/98, amended by B.C. Regs. 72/98, 73/98, and 119.2000, §§ 3-5 (Pet. App. 194a-202a).

[6] Special Directive No. 4 to the British Columbia Hydro and Power Authority, O.I.c. 494/2000, §§ 5-8 (Pet. App. 191a-192a).

to which the Province: issues regulations or directives regarding the planning, management, and reporting of capital expenditures by government bodies; creates a special account under Provincial control for insurance and risk management services; requires financial and accounting operations to be reported to the Provincial Comptroller General; and mandates that investments, loans, and debts be administered through the Province.[7] The Lieutenant Governor in Council appoints BC Hydro's board of directors, and these Provincially appointed board members also constitute a majority of Powerex's board of directors. Those same Provincially appointed board members then appoint Powerex's remaining outside directors, subject to Provincial approval. *See id.* at 28a-29a.

BC Hydro further acts as Powerex's treasurer, and BC Hydro's borrowings in turn are guaranteed by the Province. *See id.* at 29a. Unlike private corporations, Powerex is exempt from income taxes under the Canadian and Provincial tax laws.[8]

4. a. In the district court, Powerex argued that it was entitled to remove this case to federal court as a foreign state's "instrumentality," within the meaning of § 1603(b), for two independent reasons. First, Powerex asserted that it performs a public activity on behalf of a foreign government and is therefore an "organ of a foreign state," under § 1603(b)(2). Second, Powerex argued that because the statutory agent of a foreign state – *i.e.*, BC Hydro – owns all of its stock, it is an entity "a majority of whose shares" are "owned by a foreign state," under § 1603(b)(2). *See* Def.'s Opp. to Mot. to Remand at 23-31.

Powerex recognized that the Ninth Circuit's recent decision in *NRG Energy*, which – as noted above – is the subject of a pending petition for certiorari, had denied

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[7] Financial Administration Act, [R.S.B.C. 1996], ch. 138, §§ 1(b), 4.1, 8, 30, *at* http://www.qp.gov.bc.ca/statreg/stat/F/96138_01.htm.

[8] Constitution Act, 1867 (The British North America Act), 30 & 31 Vict., ch. 3 (U.K.), [R.S.C. 1985], App. II, No. 5, § 125 (Pet. App. 150a).

Powerex's claim to foreign-state status under § 1441(d) and § 1603(a) of the FSIA. *See* Def.'s Opp. to Mot. to Remand at 23 n.11. But Powerex argued that *NRG Energy* foreclosed only one of its two grounds for removal under § 1441(d). Although that case had rejected Powerex's first contention – that it is an organ of a foreign state – Powerex asserted that the *NRG Energy* panel had failed to address Powerex's second argument – that the Province's ownership of Powerex through its agent satisfies the second clause of § 1603(b)(2). That panel had found it dispositive that "Power[e]x is not owned by the Province but by BC Hydro," Pet. App. 48a, noting that, under this Court's decision in *Dole Food*, 538 U.S. at 474, tiered or indirect ownership of a majority of shares by a foreign state does not, without more, satisfy the FSIA's statutory requirements. But the *NRG Energy* court failed to recognize that Powerex was not making a claim of indirect ownership – Powerex's argument was that it is, in fact, directly owned by the Province, through an agent created by Provincial statute, BC Hydro. Powerex thus asserted that the court here was free to deny remand based on Powerex's second contention, without transgressing the binding precedent of *NRG Energy*. *See* Def.'s Opp. to Mot. to Remand at 29. In addition, Powerex reiterated its position that it is an organ of the Province under § 1603's fact-sensitive standard. *See id.* at 26-29.

b. The district court in this case peremptorily concluded that § 1441(d) and the FSIA did not entitle Powerex to remove this case, and it granted California's motion to remand. The court's cursory analysis of Powerex's asserted right to remove under § 1441(d) consisted principally of a quotation from *NRG Energy*: "Powerex is 'not a foreign instrumentality under FSIA.'" Pet. App. 14a (quoting Pet. App. 48a). The court misunderstood Powerex's second argument, apparently believing that Powerex was claiming that its corporate structure had changed since *NRG Energy* was decided. Like the *NRG Energy* panel before it, the district court here incorrectly

restated Powerex's argument as a claim of indirect ownership. It reasoned that, "[a]lthough Powerex is owned by BC Hydro and BC Hydro is an agent of the Province, the Province does not itself own a majority of the shares of Powerex" and therefore "Powerex is not a foreign state for purposes of FSIA," *id.* at 14a-15a, as that statute was interpreted by this Court in *Dole Food*.

c. The day the district court's judgment was entered on the docket, Powerex filed a notice of appeal and requested a stay of the court's remand order pending resolution of the appeal, which the district court denied.

5. Powerex then filed in the Ninth Circuit a motion to stay the remand order. The court of appeals ordered Powerex to show cause why its appeal should not be dismissed for lack of jurisdiction, noting that an order remanding a removed action to state court for lack of subject-matter jurisdiction is generally not reviewable by a court of appeals. *See* Pet. App. 2a-3a (citing § 1447(d)).

In its response, Powerex pointed out that, in the *NRG Energy* appeal, which was in the same procedural posture as this case, the Ninth Circuit twice held that it had jurisdiction to review an order concluding that Powerex was not entitled to remove under § 1441(d) and the FSIA and remanding that case to state court. First, a motions panel in *NRG Energy* discharged a show-cause order similar to the one issued in this case after determining that the court had jurisdiction to entertain the appeal. *See* Order at 2, *California v. NRG Energy Inc.*, Nos. 02-57200 *et al.* (9th Cir. Feb. 20, 2003). Second, the court's opinion disposing of that appeal on the merits reaffirmed the motions panel's determination, explaining that § 1447(d) does not preclude a court of appeals' review of a district court's resolution of a substantive issue on the merits – such as a defendant's status as a foreign state under the FSIA – that is separable from the order of remand. *See NRG Energy*, Pet. App. 42a.

After reviewing the parties' responses to its order to show cause, the Ninth Circuit dismissed Powerex's appeal

in a two-sentence order, citing § 1447(d) and this Court's decision in *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 128 (1995). *See* Pet. App. 1a.[9]

REASONS FOR GRANTING THE PETITION

1. The Ninth Circuit's decisions in *NRG Energy* and this case conflict with the decisions of three other circuits on an issue of critical importance to the unhindered flow of cross-border and international commerce. Contrary to the Ninth Circuit's erroneous rulings, Powerex is no mere for-profit energy corporation. Rather, it is an "organ" of a foreign state because its creation, purposes, conduct, and operations all reflect the public policy judgments of British Columbia, as enacted by Provincial statute and administered by public officials. Treating Powerex as a

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[9] The court of appeals' dismissal of this appeal for lack of jurisdiction presents no impediment to this Court's consideration of this matter, because it was not based on the general rule that an appellate court lacks jurisdiction under § 1447(d) to review an order of remand. Indeed, it could not have been. The court in this case was bound by the *NRG Energy* panel's correct conclusion that the resolution of a removing party's claim to foreign-state status under the FSIA is a legal ruling preceding the decision to remand that can be reviewed on appeal consistent with § 1447(d). *See* Pet. App. 42a. If the court of appeals had here concluded that § 1447(d) barred any review of the district court's determination that Powerex was not a foreign state entitled to remove under the FSIA, that conclusion would have conflicted with the Ninth Circuit's holding to the contrary in *NRG Energy*, in violation of the well-settled principle that a panel cannot overrule a decision of a prior panel. *See, e.g., United States v. Rodriguez-Lara*, 421 F.3d 932, 943 (9th Cir. 2005). Thus, the only plausible interpretation of the court of appeals' decision to dismiss this appeal is that the panel considered Powerex's contentions under the FSIA, but believed that those arguments had been foreclosed by *NRG Energy*'s conclusion that Powerex was not entitled to remove under that statute. Because the court found that the legal issues presented in this case had been resolved in *NRG Energy*, there was no live substantive issue separable from the remand order over which the panel could have jurisdiction. Consequently, the panel in this case dismissed Powerex's appeal for lack of jurisdiction. The Ninth Circuit's dismissal of this appeal was therefore based on its decision to adhere to *NRG Energy*'s rejection of Powerex's claim of foreign-state status under the FSIA, not on the general bar to appellate review in § 1447(d).

purely private, commercial enterprise disregards the Province's governmental role in cross-border electricity trade and water management in accordance with treaties between Canada and the United States. Powerex's electricity sales, which the court of appeals seized on as evidence of a private, not public, purpose, are not taxed like an ordinary private commercial enterprise but rather are used to generate "profits" back to the Provincial government to stabilize the rates that citizens pay for electricity, to comply with Provincial statutes to subsidize British Columbia businesses, or to meet other Provincial budgetary needs and public purposes. As a Provincial organ, Powerex is subject to a host of unique burdens, such as Provincial oversight, while enjoying benefits such as financial support from the Province and immunity from Provincial and federal taxation that private entities do not share.

The Ninth Circuit's mechanical approach to the interpretation of § 1603(b)(2) makes all of those facts legally irrelevant and, consequently, renders insignificant the core question of whether the entity "engages in activity serving a national interest and does so on behalf of its national government." *USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190, 209 (3d Cir. 2003), *cert. denied*, 541 U.S. 903 (2004). Because this case would have come out differently in the Second, Third, and Fifth Circuits, which reject a categorical approach in favor of a totality-of-the-circumstances inquiry, this Court should grant certiorari.

The practical consequences of the Ninth Circuit's decisions are clear. Foreign governments will be exposed to the ad-hoc decision making of state courts within the Ninth Circuit's territorial reach for conduct that, in other circuits, remains appropriate for federal review under nationally uniform standards. If governmental entities are denied the jurisdictional and substantive protections of the FSIA because of the Ninth Circuit's restrictive, mechanistic test, there will be a chilling effect on future trade activity to the region's detriment. The Ninth Circuit's adherence to *NRG Energy* also brings the U.S. into

conflict with its cross-border partners, as evidenced by the *amicus* filings of Canada and the Province in No. 05-85.

2. The Ninth Circuit's second holding in *NRG Energy*, which the district court followed in this case and the court of appeals declined to revisit, also raises a question of great significance. The court misread the rule established by this Court in *Dole Food* that Congress intended the requirement of an "ownership interest" in § 1603(b)(2) of the FSIA to be governed by the common law standards applicable to private corporations. Notwithstanding this Court's guidance, the Ninth Circuit's interpretation of the FSIA absolutely precludes the application of common law principles of agency to entities owned by foreign governments through statutory agents in determining whether an entity is "owned" by the foreign government. That rule ignores the common law of corporate agency under which BC Hydro's ownership of Powerex is imputed to its principal, British Columbia. The Ninth Circuit's decisions in *NRG Energy* and this case thus confuse "ownership" with "control" and invert this Court's holding to mean that "as a categorical matter" all agents are deemed distinct from their principals. *Dole Food*, 538 U.S. at 475-76.

Finally, the Ninth Circuit's decision to follow *NRG Energy* in this case without discussion confirms that plenary review by this Court is Powerex's only avenue for obtaining meaningful appellate consideration of its claims. Denial of that review would force Powerex to defend itself against multiple suits in state court, stripped of the jurisdictional and procedural protections guaranteed it by Congress in the FSIA.

I. THE NINTH CIRCUIT CREATED A MULTI-CIRCUIT CONFLICT ON WHAT CONSTITUTES AN FSIA "ORGAN" OF A FOREIGN STATE

A. The Ninth Circuit's New Standard Eliminates The Fact-Specific Analysis Congress Imposed

1. The Ninth Circuit fundamentally misunderstood that Congress intended for courts to examine foreign enti-

ties claiming "organ" status under the FSIA by employing a fact-sensitive inquiry that considers a range of characteristics. The FSIA defines a "foreign state" broadly to include both the sovereign nation itself, and any "agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a); *see Gates v. Victor Fine Foods*, 54 F.3d 1457, 1460 (9th Cir. 1995) (concluding that Congress "intended the terms 'organ' and 'agency or instrumentality' to be read broadly"). Section 1603(b) defines an agency or instrumentality to include any entity that (1) "is a separate legal person, corporate or otherwise," (2) "is an organ of a foreign state" or "a majority of whose shares or other ownership interest is owned by a foreign state," and (3) "is neither a citizen of a State of the United States" nor "created under the laws of any third country." 28 U.S.C. § 1603(b)(1)-(3). Powerex indisputably is a separate legal entity and a citizen of neither the United States nor some third country. The only issue, therefore, is whether Powerex is an "organ" under § 1603(b)(2).

Congress did not define "organ." Nonetheless, commentators have consistently recognized that the fact-sensitive organ test is necessary to address entities that "might not have ownership interests familiar to American judges or lawyers, but that have close connections with the state."[10] Nor is Congress's silence on the definition of a foreign "organ" unusual in the FSIA. Section 1603(d) defines a "commercial activity" only by "reference to the nature of the course of conduct." As the FSIA legislative history explains, this vague standard reflects the view that "[i]t has seemed unwise to attempt an excessively precise definition of this term, even if that were practicable." H.R.

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[10] Joseph W. Dellapenna, *Refining the Foreign Sovereign Immunities Act*, 9 Willamette J. Int'l L. & Disp. Resol. 57, 81 (2001); *see also* Report of the Working Group of the American Bar Association, *Reforming the Foreign Sovereign Immunities Act*, 40 Colum. J. Transnat'l L. 489, 516 (2002); Joseph W. Hardy, Jr., Note, *Wipe Away the Tiers: Determining Agency or Instrumentality Status Under the Foreign Sovereign Immunities Act*, 31 Ga. L. Rev. 1121, 1161 (1997).

Rep. No. 94-1487, at 16, 1976 U.S.C.C.A.N. at 6615. Instead, Congress granted the courts "a great deal of latitude in determining what is a 'commercial activity.'" *Id.* The omission of a precise definition of "organ" thus indicates Congress's intent to provide the courts with a broad and flexible standard for evaluating whether an entity is a foreign sovereign's "organ." *See Gates*, 54 F.3d at 1460 (concluding that Congress "intended the terms 'organ' and 'agency or instrumentality' to be read broadly").

2. The Ninth Circuit's decisions in *NRG Energy* and this case, which build on its prior decision in *Dole Food*, honor none of these principles and instead embrace a mechanical and inflexible approach to organ status under the FSIA.[11] The court determines organ status using none of the flexible and fact-specific analysis envisioned by Congress that would address the creation, composition, and daily functions of the entity. Instead, the Ninth Circuit in *NRG Energy* engaged in a rigid (and circumscribed) analysis of four factors: (1) the purpose of the entity's activities; (2) the entity's independence from the government; (3) the level of financial support from the government; and (4) the entity's immunity from suit. *See* Pet. App. 47a. That test disregards any consideration of critical characteristics such as the circumstances surrounding the entity's creation, employment requirements, or structures imposed by the foreign government that other cir-

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[11] Although this Court affirmed the Ninth Circuit's decision in *Dole Food*, its review was limited to the meaning of "ownership" in § 1603(b)(2), which extends agency or instrumentality status to an entity "a majority of whose shares or other ownership interest is owned by a foreign state." 28 U.S.C. § 1603(b)(2); *see Dole Food*, 538 U.S. at 471 (explaining question presented as whether "a corporate subsidiary can claim instrumentality status where the foreign state does not own a majority of shares but does own a majority of the shares of a corporate parent one or more tiers above the subsidiary"). In addition, this Court held that instrumentality status under § 1603(b) must be determined at the time the suit is filed. *See* 538 U.S. at 478. This Court did not review the Ninth Circuit's analysis of organ status under the FSIA.

cuits have specifically held are crucial attributes of an organ's sovereign status. *See* pp. 20-21, *infra*.

Moreover, the characteristics deemed dispositive by the Ninth Circuit are contrary to both the FSIA's text and logic. First, the "degree of independence" inquiry conflicts with § 1603(a), which expressly states that the term "foreign state" "includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a). Section 1603(b) defines an agency or instrumentality to include any entity that (1) "is a separate legal person, corporate or otherwise," (2) "is an organ of a foreign state or political subdivision" of a foreign state, and (3) "is neither a citizen of a State of the United States" nor "created under the laws of any third country." *Id.* § 1603(b)(1)-(3). The Ninth Circuit held that Powerex's "high degree of independence" from the Province denied it organ status, *NRG Energy*, Pet. App. 48a, but, to be an agency or instrumentality at all, the entity must be "a separate legal person, corporate or otherwise," 28 U.S.C. § 1603(b)(1). The Ninth Circuit's approach thus functionally nullifies a statutory prerequisite for a sovereign "agency or instrumentality" because it posits that an independent entity *cannot* be the sovereign's "organ."[12]

Second, the Ninth Circuit's "lack of financial support from the government" prong (*NRG Energy*, Pet. App. 48a) finds no support in the text of the FSIA or in logic.[13] The

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[12] *Cf. EIE Guam Corp. v. Long Term Credit Bank of Japan, Ltd.*, 322 F.3d 635, 640 (9th Cir.) (concluding that organ status remains appropriate even where the entity "has some autonomy from the foreign government"), *cert. denied*, 540 U.S. 1003 (2003); *EOTT Energy Operating Ltd. P'ship v. Winterthur Swiss Ins. Co.*, 257 F.3d 992, 997 (9th Cir. 2001) (explaining that organ status is not defeated "even though the government was not involved in the day-to-day activities" of the entity); *see also Gates*, 54 F.3d at 1461 ("that the Province is not directly involved in the day-to-day activities of [an agency] does not mean that it is not exercising control over the entity").

[13] Worse still, the Ninth Circuit's application of its erroneous legal standard is not even supported by the record facts. Powerex does enjoy financial support from the Province, relying on the Province's credit

text, in fact, rebuts the Ninth Circuit's suggestion because a foreign sovereign can still retain its sovereign status when it engages in "commercial activity" even though it will not be immune from suit. 28 U.S.C. § 1605(a)(2). On that basis, numerous courts have held that a foreign sovereign entity engaging in commercial activity – such as Powerex – is still entitled to remove a suit from state court and to litigate in federal court under procedural protections afforded by the FSIA. *See, e.g., USX*, 345 F.3d at 209; *EIE Guam*, 322 F.3d at 635. That is because, notwithstanding an absence of substantive immunity, "[t]he FSIA is the exclusive source of subject matter jurisdiction over suits involving foreign states and their instrumentalities." *Corporacion Mexicana de Servicios Maritimos, S.A. de C.V. v. M/T Respect*, 89 F.3d 650, 654 (9th Cir. 1996). Nothing in the text suggests that Congress intended to distinguish between sovereigns engaging in commercial activity that need to be subsidized by the government and those that do not. And such a notion is flatly inconsistent with the U.S. government's practice, which operates instrumentalities such as BPA to generate low-cost electricity for consumers and affords those instrumentalities complete immunity from suit.

Finally, the Ninth Circuit's fourth categorical factor – whether the foreign entity received "special privileges or obligations" under the foreign sovereign's law – was defined by the court in *NRG Energy* as solely whether the foreign entity was immune from suit under foreign law. Pet. App. 48a. That factor, however, ignores that a foreign sovereign can imbue its organs with numerous "privileges or obligations" without necessarily conferring immunity from suit. In Powerex's case, those "privileges or obligations" include exemption from Provincial and federal taxation,[14] a remittance of income to BC Hydro's

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rating to support its trades in the electricity market and financial guarantees issued by BC Hydro in support of Powerex's export trade.

[14] *See, e.g., Bolden v. Southeastern Pennsylvania Transp. Auth.*, 953 F.2d 807, 820 (3d Cir. 1991) (en banc) (discussing "attributes associ-

consolidated financial statement or directly to the Province, and a mandate that the organ perform treaty functions and governmental purposes not required of private entities. As a litmus test, the one chosen by the Ninth Circuit below is especially odd and regressive. Strikingly, such a test ignores that Congress, in requiring an organ of a foreign state to be a "separate legal person," specifically intended the term to encompass "a corporation, association, foundation, or any other entity which, under the law of the foreign state where it was created, *can sue or be sued in its own name*, contract in its own name or hold property in its own name." H.R. Rep. No. 94-1487, at 15, 1976 U.S.C.C.A.N. at 6614 (emphasis added). Instead, the Ninth Circuit's test would impose on foreign sovereigns a duty under their own law to make their organ immune from suit solely so they could litigate in a United States federal court *without* substantive immunity under the commercial activities exception. Nothing in the text or purposes of the FSIA compels such a strange result.

B. The Ninth Circuit's Decisions Conflict With Three Circuits On Whether A Commercial Entity Performing Government Functions Is An Organ Of A Foreign State

1. By adhering to *NRG Energy*, the Ninth Circuit below applied a standard for determining organ status under the FSIA that differs from the existing majority test and exacerbates a significant split of authority among four federal circuits. Consequently, foreign governments now lack a "predictable, uniform jurisdictional scheme" under the FSIA. *See* Dellapenna, *supra*, 9 Willamette J. Int'l L. & Disp. Resol. at 92. That result cannot be squared with Congress's intent in passing the FSIA to confer "broad jurisdiction in the Federal courts" to ensure "uniformity in decision, which is desirable since a disparate treatment of

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ated with sovereignty" including exemption from taxation); *Gorenc v. Salt River Project Agric. Improvement & Power Dist.*, 869 F.2d 503, 507 (9th Cir. 1989) (explaining that "immun[ity] from taxation on the sale of electricity" is an "attribute[] of . . . sovereign[ty]").

cases involving foreign governments may have adverse foreign relations consequences." H.R. Rep. No. 94-1487, at 13, 1976 U.S.C.C.A.N. at 6611; *see also Davis v. McCourt*, 226 F.3d 506, 509 (6th Cir. 2000) ("Congress enacted the FSIA in part to create a uniform body of law by establishing federal courts as the preferred forum for cases involving foreign states.").

Applying those principles, a majority of circuits has rejected the rigid analysis adopted by the Ninth Circuit in this case and concluded that "an entity that engages in activity serving a national interest and does so on behalf of its national government qualifies for the protections of the FSIA, including a federal forum." *USX*, 345 F.3d at 209. In making that assessment, those courts examine six separate and independent factors: (1) the "circumstances surrounding the entity's creation"; (2) the "purpose of its activities"; (3) the entity's "independence from the government"; (4) the "level of government financial support"; (5) the entity's "employment policies"; and (6) the entity's "obligations and privileges under the foreign state's law." *Id.* at 206, 209; *see also Filler v. Hanvit Bank*, 378 F.3d 213, 217 (2d Cir.), *cert. denied*, 125 S. Ct. 677 (2004); *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 846-47 (5th Cir. 2000). A host of district courts likewise follows the majority's multi-factor approach.[15] Mindful, however, that Congress intended to accord foreign entities "immunity not only from liability, but from the burdens of litigation as well," these courts will "*not* apply them mechani-

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[15] *See, e.g., In re Terrorist Attacks on September 11, 2001*, 349 F. Supp. 2d 765, 790-91 (S.D.N.Y. 2005); *RSM Prod. Corp. v. Petroleos de Venezuela Societa Anonima*, 338 F. Supp. 2d 1208, 1215 (D. Colo. 2004); *Shirobokova v. CSA Czech Airlines, Inc.*, 335 F. Supp. 2d 989, 991 (D. Minn. 2004); *Filler v. Hanvit Bank*, 247 F. Supp. 2d 425, 428 (S.D.N.Y. 2003), *vacated in part on other grounds*, Nos. 01 Civ. 9510 *et al.*, 2003 WL 21729978 (S.D.N.Y. July 25, 2003), *aff'd*, 378 F.3d 213 (2d Cir.), *cert. denied*, 125 S. Ct. 677 (2004); *United States Fid. & Guar. Co. v. Braspetro Oil Servs. Co.*, No. 97 Civ. 6124, 1999 WL 307666, at *5 (S.D.N.Y. May 17, 1999), *aff'd*, 199 F.3d 94 (2d Cir. 1999); *Supra Med. Corp. v. McGonigle*, 955 F. Supp. 374, 378-79 (E.D. Pa. 1997).

cally or require that all . . . support an organ-determination." *Kelly*, 213 F.3d at 847; *see also USX*, 345 F.3d at 207, 209 (noting "congressional goals of promoting uniformity of decision and avoiding impairing foreign relations," and holding "no one [factor] is determinative").

2. The Ninth Circuit initially appeared to have adopted a standard comparable to that of the other circuits. *See Gates*, 54 F.3d at 1460-61 (concluding that the Alberta Pork Producers Development Corporation, a Canadian entity established pursuant to a Provincial statute, constituted an organ of the Province because it was established pursuant to Provincial statute and served Provincial public policy purposes); *Corporacion Mexicana*, 89 F.3d at 655 (holding that Pemex Refining qualified as an organ of the Mexican government).

In *Dole Food*, however, the Ninth Circuit adopted a new test that contrasted with Congress's expectation that the FSIA would govern jurisdiction over suits brought against a foreign state's organ engaged in commercial activities. The court considered the organ status of entities "created by Israel" to "exploit[] the Dead Sea resources owned by the government" and "classified as 'government companies' under Israeli law." *Patrickson v. Dole Food Co.*, 251 F.3d 795, 808 (9th Cir. 2001), *aff'd in part*, 538 U.S. 468 (2003). In addition, the government "had the right to approve the appointment of directors and officers, as well as any changes in the capital structure" of the entities, and the power to "constrain" the entities' use of profits as well as the salaries of the directors and officers. *Id.*

Although acknowledging those facts, and characterizing the question as "close," the *Dole Food* court ultimately concluded that the entities did not qualify as instrumentalities under the FSIA. The court based its conclusion on the absence of any "regulatory authority" by the entities and the entities' employment of private rather than civil servants. *Id.* The court did not explain what, if any, significance it attributed to the circumstances surrounding Israel's creation of the entities or the concededly public

purpose of exploiting governmental resources. *Dole Food* thus shifted away from the sound approach of the Second, Third, and Fifth Circuits by de-emphasizing certain attributes of sovereignty while elevating the importance of commercial activities in denying FSIA protections.

3. The court's decision in this case now confirms that the Ninth Circuit has indeed rejected the contextual approach advanced by other circuits, thereby creating a clear split of authority on the meaning of a key provision in the FSIA. The Ninth Circuit's new approach ignores two basic factors relied on by the other circuits to determine an entity's organ status. First, the Ninth Circuit no longer considers the circumstances surrounding the creation of a governmental entity. It is illogical, however, to attempt to determine whether an entity serves a sovereign purpose on behalf of a foreign government without any consideration of the circumstances that led to its creation. *See USX*, 345 F.3d at 210. Second, the Ninth Circuit gives no weight to the employment policies and responsibilities of the entity. Yet employment policies are a common means of imposing governmental oversight and furthering the public mission of a governmental agency.

The Ninth Circuit's test renders both factors irrelevant or insufficient. There is simply no reading of the Ninth Circuit's decision in *NRG Energy*, therefore, that will reconcile the court's new "categorical" approach to an entity's sovereign status with the decisions of the other circuits where no one factor is deemed "determinative." *USX*, 345 F.3d at 209; *Kelly*, 213 F.3d at 847.

4. Had the Ninth Circuit below applied the totality-of-the-circumstances approach to organ status accepted in the Second, Third, and Fifth Circuits, which includes assessing the circumstances of Powerex's creation and the employment policies imposed by the Province of British

Columbia, the court would have readily concluded that Powerex qualified as an "organ" of British Columbia.[16]

First, the circumstances surrounding Powerex's creation establish a sovereign purpose and thus "weigh more heavily in favor of organ status." *USX*, 345 F.3d at 210. Powerex was created by a directive of the Province's Minister of Energy to act as the Province's exclusive export agency for marketing the Province's governmentally owned and generated surplus hydropower capacity in a manner that maximized benefits to British Columbia and its citizens. *See Corporacion Mexicana*, 89 F.3d at 655 (Pemex Refining qualified as an organ of the Mexican government because it was "created by the Mexican Constitution, Federal Organic Law, and Presidential Proclamation" and granted "exclusive responsibility of refining and distributing Mexican government property").

To fulfill those goals, Powerex was created as a wholly owned subsidiary of a Canadian Crown Corporation of the Province that is the Province's agent by statute. Powerex was also assigned Provincial treaty rights and obligations under the Columbia River Treaty and the Skagit River Treaty, and now carries out treaty obligations concerning natural resources within the Province's exclusive control. Powerex is inseparable from the Province in critical respects (including use of the Province's credit rating) and is directly controlled by the Provincial Government through its role in appointing and approving the members of Powerex's board. Finally, Powerex's revenue does not result in private "profits," but is instead consolidated with those of its parent, BC Hydro, and made available for distribution for public purposes through the Province's consoli-

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[16] This Court has explained that, while "[i]t is not customary for this Court to review the sufficiency of the evidence, . . . we will do so when the issue is properly before us and the benefits of providing guidance concerning the proper application of a legal standard and avoiding the systemic costs associated with further proceedings justify the required expenditure of judicial resources." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 230 (1993) (collecting cases).

dated general revenues (or, in the case of the Canadian Entitlement, made available directly to the Province).

By ignoring the circumstances of Powerex's creation, the Ninth Circuit failed to consider the "national purpose" that Powerex serves in marketing energy produced from British Columbia's water resources and in performing treaty obligations for the Province and Canada. *See Kelly*, 213 F.3d at 848 (entity was created for a national purpose "because it was formed by government decree to develop and explore Syria's mineral resources, control over which is a basic aspect of sovereignty").

Second, the employment policies imposed on Powerex by the Province indicate the public nature of Powerex's functions. Although not considered by the Ninth Circuit, Powerex is controlled by governmental appointees. The Lieutenant Governor in Council (the Executive Council of the Province) directly appoints BC Hydro's board of directors, which, in turn, appoints the Powerex board. *See* Pet. App. 28a-29a. A subset of the Provincially appointed BC Hydro board constitutes the majority of the seven seats on Powerex's board, and the remaining outside directors must be confirmed by the Premier's office. *See id.* at 29a.

Moreover, while the Province does not directly pay the salaries of Powerex employees, Powerex must comply with Provincial guidelines for public employee compensation. *See id.* at 32a. These guidelines constrain Powerex from paying rates to its employees that are equal to those paid by private energy companies. The Province also guarantees the pension benefits of Powerex's employees. *Cf. USX*, 345 F.3d at 213 (participation in private rather than public pension plan does not support organ status).

Those facts, together with Powerex's exemption from Provincial or federal taxation and its access to BC Hydro financial support for export trade transactions, confirm that, under the plain meaning of "organ" in § 1603(b)(2) uniformly applied by the Second, Third, and Fifth Cir-

cuits, the Ninth Circuit should have reversed the district court's ruling that the case was not properly removed.[17]

C. Uniform Application Of The FSIA's Protections Is Critically Important To Foreign Governments Conducting Business In The U.S.

The volume of commerce that will be affected by the Ninth Circuit's rulings is staggering. From 2000 through 2004, a mere three Canadian crown corporations – Hydro-Quebec, New Brunswick Power Corp., and Manitoba Hydro-Electric Board – exported more than $13.8 billion Canadian of energy products into the United States, and Powerex itself exported $10.9 billion Canadian.[18] In 2001-

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[17] In addition to misunderstanding the facts and law of the factors on which it *did* rely, the *NRG Energy* court erred in perceiving the Dead Sea Companies in *Dole Food* as the most analogous entities. *See* Pet. App. 47a-48a. The Dead Sea Companies in *Dole Food* were not wholly owned by the government, did not perform treaty functions, and did not return profits to the government. Rather, the proper analogy should have been to *EIE Guam*, 322 F.3d at 640-41. There, as here, the government had created the corporation "to perform a public function" and "'to carry out [the foreign government's] national policy.'" *Id.* at 640. The government had also vested exclusive authority in and provided funding for the corporation "'to perform' such activities.'" *Id.* In all respects, Powerex is like the government corporation in *EIE Guam*, which was permitted to remove a case filed in Guam territorial court and to litigate instead in federal court. *See id.* at 637.

[18] *See* Hydro-Quebec, *Annual Report 2004*, at 107 (Mar. 31, 2005); Hydro-Quebec, *Annual Report 2002*, at 97 (Mar. 31, 2003); Hydro-Quebec, *Annual Report 2001*, at 91 (Mar. 31, 2002); BC Hydro, *2005 Annual Report* at 109 (June 29, 2005); BC Hydro, *2004 Annual Report* at 124 (June 14, 2004); BC Hydro, *2003 Annual Report* at 127 (July 21, 2003); BC Hydro, *2001 Annual Report* at 67 (July 11, 2002); New Brunswick Power Corp., *2003/04 Annual Report* at 47 (June 30, 2004); New Brunswick Power Corp., *2002/03 Annual Report* at 44 (June 30, 2003); New Brunswick Power Corp., *2001/02 Annual Report* (June 28, 2002); New Brunswick Power Corp., *2000/01 Annual Report* at 45 (June 28, 2001); Manitoba Hydro-Electric Board, *53rd Annual Report* at 87 (Aug. 11, 2004); Manitoba Hydro-Electric Board, *51st Annual Report* at 51 (July 29, 2002); Manitoba Hydro-Electric Board, *49th Annual Report, summary available at* http://www.hydro.mb.ca.

2003, Canada's energy exports to Ninth Circuit states totaled more than $20.9 billion.[19]

When, inevitably, disputes regarding that cross-border commerce arise within the Ninth Circuit's territorial reach, entities sharing the characteristics of Powerex will be subject to major uncertainties about their procedural and substantive rights under the FSIA. Should the Ninth Circuit's new interpretation of § 1603(b)(2) stand, corporations created by foreign governments will face not only the prospect of being confined to state court – no mere idle concern given that California's federal district judges have recused themselves in cases arising out of the California energy crisis of 2000-2001 but California's state judges have not – but also a loss of the very sovereign immunity protections codified in the FSIA. *Cf. Davis*, 226 F.3d at 511 ("FSIA seeks to provide uniformity in the treatment of foreign sovereigns and to remove any local bias that might be present at a jury trial in a state court."). In stark contrast, foreign entities operating within the Second, Third, and Fifth Circuits will continue to benefit from the multi-factor, fact-sensitive approach to determining organ status. As a result, plaintiffs seeking to sue foreign sovereign corporations will have every incentive to engage in forum shopping by suing in state court in Ninth Circuit states, a phenomenon that portends a chilling effect on future cross-border and international trade, or, even worse, may spark international trade disputes.

D. The Ninth Circuit's Decisions Create Significant Tensions With The U.S.'s Duties Under The North American Free Trade Agreement

Resolution of the circuit conflict exacerbated by the Ninth Circuit's adherence to *NRG Energy* is critically im-

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[19] Canadian Embassy, *State Trade Fact Sheets 2004*, *available at* http://www.canadianembassy.org; Canadian Embassy, *State Trade Fact Sheets 2003*, *available at* http://www.dfait-maeci.gc.ca; Canadian Embassy, *State Trade Fact Sheets 2002*, *available at* http://www.dfait-maeci.gc.ca.

portant to avoid disrupting the growth of cross-border trade under NAFTA.[20] In *NRG Energy*, the Ninth Circuit upheld the district court's ruling that BPA and the Western Area Power Administration ("WAPA"), two federal agencies that are "statutorily authorized to promote the development, sale, and distribution of electric power in the western United States," possess sovereign immunity from suit. *See* Pet. App. 39a, 43a. NAFTA Article 1102(1) makes clear that the U.S. must guarantee Powerex "treatment no less favorable than it accords, in like circumstances," to domestic investors. NAFTA art. 1102(1), 32 I.L.M. at 639 (Pet. App. 135a). This "broad requirement" establishes that there "shall be no discrimination by a Party as between domestic and foreign investors." Daniel Q. Posin, *The Multi-Faceted Investment Arbitration Rules of NAFTA*, 13 World Arb. & Mediation Rep. 13, 13-14 (2002). By treating other comparable and functionally similar U.S. wholesale power suppliers such as BPA and WAPA as sovereign entities while denying Powerex's status as a foreign sovereign – even though BPA and Powerex alike perform governmental duties under the Columbia River Treaty – the decision below gives an unfair national benefit to a U.S. entity in discrimination against a Canadian entity.

Such treatment violates NAFTA standards and unnecessarily entangles the courts in matters of foreign economic policy entrusted to the Executive Branch. *See* Todd Weiler, *The Treatment of SPS Measures Under NAFTA Chapter 11: Preliminary Answers to an Open-Ended Question*, 26 B.C. Int'l & Comp. L. Rev. 229, 241 (2003) (the goal of the non-discrimination clause "is to provide the foreign firm with the promise of an effective equality of competitive opportunities between it and its competitors"). Moreover, by applying a different standard for

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[20] North American Free Trade Agreement Between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States, done Dec. 17, 1992, 32 I.L.M. 289 ("NAFTA").

organ immunity to Powerex than previously applied to foreign investments by a Mexican entity (in *Corporacion Mexicana*), the Ninth Circuit's decisions fail to "accord to investors of [the Province] treatment no less favorable than that it accords, in like circumstances, to investors of any other" NAFTA member nation. NAFTA art. 1103(1), 32 I.L.M. at 639 (Pet. App. 136a). The Court should thus grant certiorari to correct the Ninth Circuit's erroneous view of the FSIA and the resulting tension with the principle of non-discrimination underlying NAFTA.

II. THE NINTH CIRCUIT'S "OWNERSHIP" HOLDING CONFLICTS WITH *DOLE FOOD*

The Ninth Circuit also erred in conflict with this Court's guidance on a second issue of great significance: the court rejected Powerex's argument that common law principles of agency remain applicable to entities owned by foreign governments through statutory agents in determining whether an entity is "owned" by the foreign government. By holding that such principles do not apply, the Ninth Circuit's test for ownership conflicts with this Court's precedent on an issue with substantial ramifications for corporate agencies of all foreign governments.

Section 1603(b)(2) defines an agency or instrumentality of a foreign state to include both an organ of the foreign state and an entity "a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." In *Dole Food*, this Court held that courts must construe § 1603(b)(2) using the "basic tenet[s]" of American corporate law. 538 U.S. at 474. The Court explained that, in drafting § 1603(b)(2), Congress "was aware of settled principles of corporate law and legislated within that context." *Id.*; *see also* H.R. Rep. No. 94-1487, at 15, 1976 U.S.C.C.A.N. at 6614.

Consistent with *Dole Food*, Powerex argued that BC Hydro's sole ownership interest in Powerex – held on behalf of the Province as its statutory agent – was sufficient to satisfy § 1603(b)(2). Under Provincial statutory law, BC Hydro indisputably "is for all its purposes an

agent of the government and its powers may be exercised *only* as an agent of the government." Hydro Act § 3(1) (Pet. App. 154a) (emphasis added). As the British Columbia Court of Appeals has recognized, "[s]ince its establishment BC Hydro has been an agent of the Crown in right of the Province." *Westbank First Nation v. British Columbia Hydro & Power Auth.*, [1997] 154 D.L.R. (4th) 93, *aff'd*, [1999] 4 C.N.L.R. 277. As such, Canadian courts treat all property owned by BC Hydro as owned by the Province. *See id.* at 98 (holding that property of BC Hydro is held as "the interest of the Crown in right of British Columbia and immune from taxation"). There is no logical basis for treating BC Hydro's 100% share interest in Powerex any differently from the other property BC Hydro owns on behalf of the Province.

As the Province's *agent*, BC Hydro had power to bind the Province as principal, as well as the authority to act at the Province's direction. *See Restatement (Second) of Agency* § 7 (1958) ("Authority is the power of the agent to affect the legal relations of the principal"). BC Hydro's ownership of Powerex's shares thus is legally imputed to the Province. *See id.* §§ 1, 7-8 (agent acts for the principal when performing with actual or apparent authority); *see also In re Focus Media Inc.*, 387 F.3d 1077, 1082 (9th Cir. 2004), *cert. denied*, 125 S. Ct. 1674 (2005); *Mutual Life Ins. Co. v. Mooreman*, 366 F.2d 686, 689 (9th Cir. 1966).

The Ninth Circuit failed in *NRG Energy* directly to address that argument and instead flatly concluded that, under *Dole Food*, "unless the foreign government itself actually owns the shares, the entity does not meet the definition of a foreign state." Pet. App. 48a. The court thus viewed *Dole Food* as precluding sovereign status under § 1603(b)(2) from ownership by a foreign government through an agent created by statute. That holding, however, failed to recognize that *Dole Food* addressed an entirely different question: whether § 1603(b)(2) created a *categorical* exception to the customary rule of corporate law that a corporate parent owning shares of a subsidiary

does not have legal title to the assets of the subsidiary *for that reason alone*. *See* 538 U.S. at 474. This Court's decision in *Dole Food* begins by explaining the "basic tenet of American corporate law . . . that the corporation and its shareholders are distinct entities." *Id.* Under that rule, "[a] corporate parent which owns the shares of a subsidiary does not, for that reason alone, own or have legal title to the assets of the subsidiary." *Id.* at 475. Notwithstanding this Court's holding with respect to a "tiered" corporate structure (where a parent controls a subsidiary through an intermediate entity), *Dole Food* preserves the common law rule that the interests of two otherwise distinct corporations could be deemed a single enterprise for equitable purposes "on a case-by-case basis." *Id.*

Powerex below (and in *NRG Energy*) has invoked that "case-by-case" exception and has argued that BC Hydro, as the statutory agent of the Province, necessarily held all of the shares in Powerex on behalf of its principal, the Province. In failing to address that argument, the Ninth Circuit has imposed a standard that is illogical and contrary to this Court's interpretation of congressional intent in drafting § 1603(b)(2).

The consequences of that error are severe. The Ninth Circuit's decision sweeps all forms of beneficial ownership into *Dole Food*'s scope and disavows any role for common law principles that affect corporations in the analysis of governmental ownership under the FSIA. A rule that forecloses beneficial ownership under the FSIA strips governments of the flexibility that Congress legislated as essential to the dynamic and evolving needs of international trade and foreign relations. That result impermissibly alters this Court's precedent and should be rejected.

CONCLUSION

The petition for a writ of certiorari should be granted.

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